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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-334

SEYMOUR MATANKY,
*Petitioner,*
vs.
UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari to
The United States Court of Appeals For
The Ninth Circuit

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

*To the Honorable Chief Justice Warren E. Burger and to the Honorable Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully petitions for rehearing of the decision of November 19, 1973, denying certiorari, upon the following grounds:

### I

This Court has failed to rule on whether Congress intended and did make Title 42, Section 408(b), U.S. Codes, preempt the field in connection with Social

Security claims and provided that if any offense occurred it was a misdemeanor under the provisions of Title 42, Section 408.

This is a vital issue affecting doctors all over the country, who have to rely on their medical staffs to fill out forms while they are attending to the needy sick and elderly.

Congress, in its legislative powers, did not intend to give the prosecuting branch of the government an election to decide how it will prosecute alleged offenders or what punishment should be authorized, and at no time indicated an expansion of the limitations of Title 18, Section 6, U.S. Codes, to permit the prosecution of doctors and their punishment and removal from the profession under the felony provisions of Title 28, Section 1001, and the limitations placed on that section's use to departments and agencies of the United States which Congress had designated. In the light of the scope of Congressional power and authority, we believe that this Court should grant a rehearing to carry out the Congressional purpose and intent.

Congress has never made private insurance carriers agencies and departments of the United States. It could have done so but its omission in the Social Security Act or in any amendment to Title 18 shows that it did not intend to do so.

The indictment and each count fails to allege any specific department or agency in which it is claimed that there was a violation. Therefore, the indictment

fails to state an offense against the laws of the United States in each count.

This case is one of the first cases to come before this Court in which that important issue was squarely raised and left undecided.

The government requires all agencies and departments of government to be listed in the United States Government Organization Manual and to place their names in the Federal Register in the Office of the Federal Register, National Archives and Records Services, Washington, D.C. 20408. The Manual issued by the Office of the Federal Register does not contain a listing for the names of Occidental Life Insurance Company, a branch of Trans America, Travelers Insurance Company or Blue Shield. None of the checks which the Doctor received for his services were issued by any named governmental agency or department. All of them were on the stationery and checks of the particular insurance company involved. In 1967, on July 4, the government passed certain amendments to the Administrative Procedure Act (4 USC Sec. 552) to become popularly known thereafter as the Freedom of Information Act. These three insurance companies are not listed as governmental agencies under the Freedom of Information Act either.

In *Posadas v. National City Bank,* 296 US 497, 504, 80 L.ed. 351, 355, 356, the Court said: " 'The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a

prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.' "

Examination of Title 42, Section 408, clearly shows that the later statute covering matters in the Social Security Act covers the whole ground and is clearly intended as a substitute for anything that was intended to be covered under Title 18, Section 1001.

It is our position that Title 18, Section 1001, was never intended to reach claims made to private insurance carriers and that the Legislature therefore preempted and covered the entire ground in Title 42, Section 408 and set forth the only penalty which the section authorizes, to-wit, a misdemeanor.

Analyzing the effect of a prosecution for alleged violation of the Social Security Act amounting to the removal of a doctor's medical license and his opportunity to serve the sick elderly, Congress did not intend such consequences and this Court should grant a hearing to so determine.

Furthermore, Rule 31, F.R.Cr.P., Section (c), provides as follows: "Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense

necessarily included therein if the attempt is an offense."

Prior to trial and also during the trial, the defendant first moved to dismiss the prosecution on the ground that he should have been prosecuted only under Title 42, Section 408(b), and at the conclusion of the trial he moved the Court to instruct the jury that he was entitled to have the jury instructed in accordance with Rule 31(c), F.R.Cr.P., and Title 42, Section 408(b). The Court refused this lesser and necessarily included instruction.

Since that time, this Court has ruled in *Keeble v. U.S.*, 36 L.ed.2d 844, that a defendant is entitled to an instruction under Rule 31(c) and the jury is entitled to consider the instruction as to what verdict, if any, they will return.

This Court has held that where an Indian is prosecuted in the Federal Court under the provisions of the Major Crimes Act, that he is entitled to the protection afforded by an instruction on a lesser included offense, assuming of course that the evidence warrants such instruction. We respectfully submit that this holding should apply to all persons tried in the Federal Court; that Rule 31(c) is not limited to Indians prosecuted under the Major Crimes Act, but is applicable to all statutes and all alleged offenses or offenders.

There can be no doubt that the evidence in this case warranted such an instruction to the jury and this Court should grant the hearing and so hold.

II

The Court has overlooked the failure to define and apply the word "willful", as it has this Term in the case of *U.S. v. Bishop,* 36 L.ed.2d 941, *Spies v. U.S.,* 317 US 496, 87 L.ed. 418, and *Screws v. U.S.,* 325 US 91, 106, 107, 89 L.ed. 1495.

The evidence in this case was uncontradicted that the insurance forms were made out by medical assistants and not by the doctor. This Court should grant a hearing to determine that it is not the purpose of the law to penalize innocent errors made despite the exercise of reasonable care. (See *Spies v. U.S.,* 317 US 496, 87 L.ed. 418)

In a Medicare Bulletin sent to doctor providers, it is stated in Bulletin No. 66, that "Approximately 38% of all claims received contain one or more errors".

Omission to charge the jury regarding the word "willful" and to establish that the defendant acted willfully was held to be plain error in *U.S. v. Krosky,* 418 F.2d 65. There was no evidence in the record that the Doctor acted willfully in signing the forms presented to the private insurance companies. The burden was on the prosecution to prove willfulness when there is none in the record. This entitled him to an acquittal,

as each count charged that each act was committed willfully. The failure of proof on this ground alone entitled the petitioner to acquittal. (*Keeble v. U.S.*, 36 L.ed.2d 844)

## III

The petitioner should be granted a hearing because of unfair trial. Only three percipient witnesses were called by the government, one, Audrey Gunderson, was insane and no effort was made to establish her competency. She had been adjudged insane by the State of California and her restoration was never established. She was placed on the witness stand by the prosecutor without revealing to the Court or jury that she was legally insane. By placing her on the witness stand the government counsel vouched for her competency as a witness.

A second witness was Robert Lane, who was called by the government as a percipient witness without revealing to the Court and jury that he was a chronic alcoholic, whose alcoholism had badly affected his memory.

The third percipient witness was a woman named Margaret Clark, a woman in her seventies, who was shown by another witness to be clearly mistaken as to any of the facts which she claimed to have recalled.

These were the only witnesses produced by the government as percipient witnesses relating to the Doctor's attendance and presence at the hospital. On mo-

tion for a new trial, affidavits were offered to the Court to establish through other witnesses named in the indictment that the Doctor had performed all of the services for which bills had been submitted. The destruction of records kept by nurses in their daily logs prevented fair trial and would have proved the Doctor's presence at times contrary to the charges set forth in the indictment. The destruction of the notes and logs persisted and continued even after the indictment was returned, thus depriving the Doctor of essential matters of defense. (*Brady v. Maryland,* 373 US 83, 10 L.ed.2d 215; *In re Cameron,* 68 Cal.2d 487, 504)

The petitioner was also singled out by the prosecutor as a man with a beard. (*Ham v. South Carolina,* 409 US 524, 529, 530)

The prosecutor also, in final argument which petitioner did not have a chance to answer to the jury, falsely stated that there was $60,000 to $70,000 involved when the only amounts named in the indictment in dispute was $2,156.60 over a two year period and this was debatable.

The prosecutor also went beyond the scope of the indictment in arguing the quality of care of the patients although this was not charged in the indictment, and was debatable, and was an alteration of the indictment returned by the Grand Jury. (*Ex parte Bain,* 121 US 1)

Congress has expressed its desire to protect doctors in their work and supervision or control over their practice by any subordinates or insurance companies by enacting Title 42, Section 1395. A more expanded interpretation of this section would seem to apply also to prosecuting agencies and to those connected with the medical program to attempt to exercise supervision or control of doctors.

We feel that there are important legal issues affecting the entire medical profession as well as litigants generally which should be heard and resolved by this Honorable Court. Basically, this case involves the control of Congress over its own laws and whether Title 18, Section 1001, which contains limitations, can be subverted by other agencies of the government and whether private insurance carriers can use the federal government as its prosecuting agency or whether this Court will hold that only the section which Congress has authorized will apply.

We are living in a time when it appears that those in high office in government can demand and receive a hearing from the Courts as Congress has specified on matters that are not any more important to the welfare of litigants than those raised by us in this petition for rehearing on matters we believe of great importance to petitioner's right to a fair trial and a just result which should be open to an American citizen at whatever level of life he has at this time.

**WHEREFORE**, petitioner prays for rehearing on all the grounds set forth above.

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioner.*

## CERTIFICATE OF COUNSEL

Counsel, Morris Lavine, certifies that the foregoing petition for rehearing is filed and presented in good faith and not for delay and presents substantial grounds and intervening circumstances of substantial or controlling effect.

MORRIS LAVINE,
*Attorney for Petitioner.*